Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-280

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GORDON H. LAWHORN, et al.
Petitioners,

v.

HAROLD C. KING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

William G. Broaddus
Attorney General

Walter A. McFarlane
Deputy Attorney General

John J. Beall, Jr., Senior
Assistant Attorney General

John M. McCarthy
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-1582
September 18, 1985

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2,3

STATEMENT OF FACTS 3

ARGUMENT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Gorieb v. Fox, 145 Va. 554,
134 S.E. 914 (1926) 11

Hudson v. Palmer,
___ U.S. ___, 104
S. Ct. 3194 (1984) 8,9,10

Parratt v. Taylor,
451 U.S. 527 (1981) 9,10

Richmond, Fredericksburg, &
Potomac Railroad Co. v. City
of Richmond, 145 Va. 225;
133 S.E. 800, 806 (1926) 11

Statutes

42 U.S.C. § 1983 5,6,7,9,11

No. 85-280

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GORDON H. LAWHORN, et al.
Petitioners,

v.

HAROLD C. KING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Harold C. King (Commissioner, Virginia Department of Highways and Transportation) respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the per curiam opinion and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion to which a writ of certiorari is sought is not reported. A copy of that opinion, however, appears beginning at p. 1a of Appendix A of the Petition for Writ of Certiorari heretofore filed. The earlier opinion of the United States District Court for the Eastern District of Virginia follows immediately thereafter in said petition, beginning at p. 13a, as Appendix B thereof.

JURISDICTION

The judgment of the Fourth Circuit was entered on May 20, 1985. The petition for writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether The Court Of Appeals Erred In Holding That Petitioner's Federal Action Brought Under 42 U.S.C. § 1983 Was Barred Under The Doctrine Of Res

Judicata Inasmuch As Petitioner Had Unsuccessfully Litigated In State Court Proceedings Claims Arising From Precisely The Same Factual Basis As The Later § 1983 Claim?

2. Whether The Excusable Breach Of A Contract Right Granted In Partial Settlement Of A Real Estate Condemnation Suit Concluded Twenty-Two Years Earlier So Vitiates That Earlier Grant of Pre-Deprivation Process As To Render The "Taking" One "Without Due Process Of Law"?

STATEMENT OF FACTS

The petitioners are owners of commercial real property in Hanover County, Virginia located along four-lane Route 301. In 1954, and in settlement of a condemnation proceeding brought by respondent's predecessor to acquire a strip of petitioners' land with which to widen from two to four lanes that adjoining route, it was agreed that the State's highway department would pay petitioners a cash amount. The highway department also agreed to build a lane crossover

in front of petitioners' property which would serve to connect the then contemplated two sets of lanes.

Twenty-two years later, when the highway department at last was able to widen the highway, it declined to construct the crossover, claiming that, due to fiscal restraints, it had been compelled to resort to utilization of the two pre-existing lanes as one-half of the "new" four lane roadway. This revised construction plan created a potentially dangerous difference in elevation at the previously planned crossover point, compounded by the obsolete sight line standards of the older of the two sets of lanes.

Faced with the state's position, the Lawhorns resorted to litigation in a state court of record seeking injunctive relief to compel the state to construct and maintain a crossover (a suit referred to by the Fourth Circuit, and hereafter by this respondent, as "Lawhorn I"). The state court declined to grant the requested relief, holding that the petitioners had never acquired through their agreement such property interest in the proposed situs of the crossover as would entitle them to injunctive relief. Additionally, the Lawhorn I court held that the contract, though valid, had

been at all times subject to a lawful exercise of the state's police powers which had been lawfully invoked by respondent because of valid safety concerns. Finding no reversible error, the Supreme Court of Virginia denied petitioners' appeal.

Thereafter, petitioners launched a second action in another state court of record to recover damages for breach of contract ("Lawhorn II"). Applying settled state law, including the doctrine of collateral estoppel to Lawhorn I's findings, the Lawhorn II court essentially held that where, as here, the state's refusal to honor a contractual obligation of this nature rested upon a subsequent, bona fide exercise of its police power, the result was deemed to be damnum absque injuria. An appeal was again undertaken to the Supreme Court of Virginia which, once again, found no reversible error.

At this juncture, petitioners resorted to the federal courts, bringing an action for compensatory and punitive damages in the United States District Court for the Eastern District of Virginia, alleging subject matter jurisdiction under 42 U.S.C. § 1983. Petitioners stated their cause of action against respondent in their federal complaint as follows:

Cause of Action

> 13. By refusing to pay plaintiffs compensation for their real property after inducing them to waive their right to due process by promising certain considerations [i.e., the crossover] which he then refused to provide, defendant deprived plaintiffs of their right to property without due process of law or just compensation in violation of their rights under the Fifth and Fourteenth Amendments to the U. S. Constitution and 42 U.S.C. § 1983. [bracketed material supplied.]

In response to Lawhorn III, the respondent filed motions both to dismiss and for summary judgment, alleging, inter alia, that the two prior final judgments on the merits had the res judicata effect of barring this third lawsuit which was grounded in the same factual circumstances.

Granting the respondent's motion to dismiss, the federal district court judge observed:

> * * * [W]hatever restrictions there may be on a State court with respect to the grant of relief under State law, there is no State law which could prohibit a State court [from] granting relief due under the Constitution of the United States. Thus plaintiff has at least twice before had the opportunity and probably the

> obligation, to assert the claim asserted in this action. [See petitioners' Appendix B at 14a.]

Petitioners had sought to avoid the looming spectre of a res judicata bar to their thrice launched cause of action by emphasizing different aspects of the same facts which had supported, as well, their earlier two lawsuits. As the Fourth Circuit was to later observe:

> In this suit they are no longer seeking damages upon the contract, but have shifted their stance to argue that they were deprived of their real property without due process or just compensation, because the state withheld part of the compensation originally promised in 1954 without offering alternative payment for the land taken. There is no reason why this theory of the case could not have been litigated in either of the State proceedings. [emphasis supplied.] [See petitioners' Appendix A at 7a.]

ARGUMENT

1. The Court Of Appeals Did Not Err In Holding That Petitioners' Federal Action Under 42 U.S.C. § 1983 Was Barred Under The Doctrine Of Res Judicata Inasmuch As Petitioner Had Unsuccessfully Litigated In State Court Proceedings Claims

Arising From Precisely The Same Factual Basis As The Later § 1983 Claim.

Solely because they failed to prevail in either of those two prior state court actions, petitioners now allege they thereby successfully answered in the negative the "actual holding in Hudson" (Pet., p. 9), namely, that " 'the controlling inquiry is solely whether the State is in a position to provide for predeprivation process.' " Id. quoting Hudson v. Palmer, _____ U.S. _____, 104 S. Ct. 3194, 3204 (1984). Accordingly, petitioners next implicitly assert the fact that they twice failed to prevail "thereby satisfied the pre-requisites [sic] for the commencement of their federal due process claim...." (Pet., p. 11.)

The disappointing results obtained by plaintiffs in their two actions before state courts proves merely that the particular remedies pressed before those state court were unavailing solely because of established, substantive legal precedent. The Fourth Circuit aptly notes this by observing in its opinion that "defeat on the substantive merits of the state law issues did not confer on plaintiffs an automatic right to shift to a federal forum without demonstrating that

they were deprived in any way of the procedural protections the Fourteenth Amendment guarantees." (petitioners' Appendix A, at 8a and 9a) (emphasis supplied.) "The state provides a remedy to persons who believe they have suffered *** loss at the hands of the State." Parratt v. Taylor, 451 U.S. 527, 543 (1981) (emphasis supplied). A hearing must be held before one is finally deprived of his property. Id. at 540. Petitioners were heard a total of four times in state trial and appellate courts. In a nutshell, fair and ample forums were provided in which to "assess the propriety of the State's action." Id. at 539.

Had petitioners properly raised their § 1983 claims in state court and been denied the procedural right to pursue that claim or, alternatively, been denied relief on such a claim for reasons contrary to the controlling interpretations of substantive constitutional law by the federal judiciary, then their claim of a later right of federal judicial access would have merited serious consideration.

At page 12, et seq. of their petition, petitioners seemingly interpret Hudson as requiring that every potential litigant claiming a deprivation of property without due

process and desiring to pursue a § 1983 claim in a federal forum first wind his way through the state court in order to demonstrate the unavailability of a state remedy. Obviously, the case does not stand for that proposition at all, for in fashioning a rule that would unburden the federal courts of the necessity of hearing every property deprivation of a random and unauthorized nature, this Court did not thereby thrust upon the state courts the duty of serving as mere academic laboratories to prove through costly, actual litigation that a state procedural remedy was not available. Indeed, in both Parratt and in Hudson, this Court judicially noticed the availability and nature of various state procedural remedies.

The Fourth Circuit's discussion concerning the applicability of the principles of res judicata to this case is flawless and no purpose would be served by its complete repetition here. Suffice it to observe that while petitioners attempt to avoid the Fourth Circuit's res judicata analysis, they are unable to challenge its correctness. That unforeseeable safety considerations frustrated the fulfillment of that obligation does not render constitutionally infirm a

condemnation proceeding amicably concluded some twenty-two years earlier! In this regard, it should be noted that even twenty-two years earlier it had been settled law in the Commonwealth that state officials could not relinquish by contract the Commonwealth's right and obligation to validly invoke the state's police power.* Richmond, Fredericksburg, & Potomac Railroad Co. v. City of Richmond, 145 Va. 225, 246, 133 S.E. 800, 806 (1926), Gorieb v. Fox, 145 Va. 554, 560, 134 S.E. 914, 916 (1926), aff'd, 274 U.S. 603, (1927).

2. The Excusable Breach Of A Contract Right Granted In Partial Settlement Of A Real Estate Condemnation Suit Concluded Twenty-Two Years Earlier Does Not Vitiate The Earlier Grant Of Pre-Deprivation Process.

Although the Fourth Circuit chose to focus exclusively upon the res judicata bar to the petitioners' § 1983 claim, the alternative ground invoked by the federal district is deserving

---

*The failure to construct the crossover, of course, has not deprived petitioners of access to Route 301. They retain immediate access to its northbound lanes and slight, very slight, circuity of access to its southbound lanes.

of mention, for it lays bare the pleading ploy by which petitioenrs attempted to breath new life into a twice concluded lawsuit.

The district court judge correctly and astutely apprehended that petitioners' claim was in reality a twice-tried breach of contract case. (See petitioners' Appendix B, p. 15a.) The petitioners' right to just compensation as determined through a pre-deprivation proceeding was fully honored by the Commonwealth. Petitioners chose in settlement as compensation some cash and a contract right which, perforce, had to remain executory until such time as a new four-lane divided route could thereafter be constructed. As heretofore noted, by entering into that contract, the Commonwealth's highway officials could not and did not bargain away for all time the state's right to validly invoke its police power.

Petitioners suggest the mere frustration of a contract right some twenty-two years later entirely vitiates both the original, impeccable grant of pre-deprivation process and the just compensation paid. This is just the sort of "artful draftsmanship" which the district court intimates could

transform "practically any breach of contract suit" (petitioners' Appendix B at 16a) against a governmental body into a federal claim of constitutional magnitude.

CONCLUSION

For the reasons stated above, respondent requests that the decision of the United States Court of Appeals for the Fourth Circuit be affirmed and the petition for certiorari denied.

Respectfully submitted,

HAROLD C. KING

BY: _____
Counsel

William G. Broaddus
Attorney General

Walter A. McFarlane
Deputy Attorney General

John J. Beall, Jr., Senior
Assistant Attorney General

John M. McCarthy
Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-1582
September 18, 1985

CERTIFICATE

In accordance with Rule 28 of the Rules of the United States Supreme Court I hereby certify that three copies of the foregoing Brief for the Respondent In Opposition were mailed, postage prepaid, this 17 day of September, 1985, to Gerald T. Zerkin, Esquire, Zerkin, Heard & Scovill, 4 North First Street, Richmond, Virginia 23219, counsel for petitioners.